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UTAH COURT OF APPEALS
BRIEF

IN THE COURT OF APPEALS OF THE STATE OF UTAH

THE STATE OF UTAH, : 30
Plaintiff/Appellee, : A10
v. :
GILBERT LOPEZ, : Case No. 980085-CA
Defendant/Appellant. : Priority No. 2

CKET NO. 981085

REPLY BRIEF OF APPELLANT

Appeal from a judgment and conviction for aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302(1)(a) (1995), in the Third Judicial District Court, Division I, in and for Salt Lake County, State of Utah, the Honorable Leslie A. Lewis, Judge, presiding.

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STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

The following are set forth in full in addendum A:

U.S. Const. amend. V
U.S. Const. amend. VI
U.S. Const. amend. XIV, §1
Utah Const. art. I, § 7
Utah Const. art. I, § 12

STATEMENT OF FACTS

The statement of facts in the State's brief contains the following inaccuracies:

At page 3, the State incorrectly asserts that the robber's vehicle had its headlights "trained" on the victims. The pages it cites stand for nothing more than that the vehicle was facing in their general direction, and that its headlights were on. There is no evidence of where exactly the headlight beams were shining, and no evidence that they were "trained" on the victims.

At page 5, the State asserts that Brandi Bergsma described the perpetrator identified at trial as Mr. Lopez as being 5'1" to 5'5" tall. Her testimony was as follows:

Q What did you put in terms of height?

A I think five-one, because I'm five-one, so I was guessing short. And at the time I just hurried and jotted everything down. Five-five.

R. 246-27. In context, Ms. Bergsma seems to be indicating that she compared the perpetrator's height to her own height of 5'1", and estimated him to be 5'5". See also Ex. 31 (attached to opening brief as addendum C), which unambiguously references the perpetrator's height as 5'5".

At page 7, the State asserts that Officer Johnson handcuffed three men, citing R. 246:83-4. While ostensibly supported by the record, this purported fact cannot be true. Richard Bergsma testified that not all the participants in the show-up were handcuffed, but Messrs. Gomez and Lopez were. R. 230:187. Officer Johnson himself later testifies that only Gomez and Lopez were handcuffed. R. 101-2. See also Ex. 24 and 26 (photographs of the show-up). While the State tries to suggest that perhaps these photographs were taken after the show up, State's brief at 5 n.5, implying that the others may have been uncuffed in the interim, this speculative assertion defies reason. The State fails to explain why it would continue to detain the other individuals after they had been excluded as perpetrators. Such a suspicionless detention would, of course, be unconstitutional.

At page 8, the State asserts that Mr. Lopez had a black t-shirt on over a white t-shirt at the time of the showup. There is no mention in the record of a black t-shirt, only of a black shirt.

At page 8, the State asserts that "Officer Johnson observed that defendant and Gomez were both short and stocky, and

were approximately 5'5" tall, and 150-160 pounds (R. 246:90)." To the contrary, while he did opine that both were short and stocky, R. 246:91, his retrospective recollection was that Mr. Gomez was 5'5", while Mr. Lopez was 5'5" or 5'6". Id. He ventured a retrospective **guess** that Mr. Lopez weighed 150-160 pounds. Id.

At page 9, the State asserts that Mr. Lopez admitted being at the scene of the crime. This is a mischaracterization. Mr. Lopez never admitted to being at the scene, and certainly not at the time of the crime. Mr. Lopez only admitted to buying beer at the Circle K located near the crime scene. This is unremarkable. The State fails to explain why Mr. Lopez should have driven from the party to a more remote retail outlet, rather than using the most readily available one. Given that the apartments where Mr. Lopez was attending the party were less than two blocks from this Circle K, R. 246:82, --78, it is completely logical that Mr. Lopez would shop there rather than a more remote, less convenient retail outlet.

At pages 10-11, the State asserts that Justin Ketterer testified that Mr. Lopez returned to the party at 11:45 p.m., when in fact he testified that he returned at "about 11:30, 11:45." R. 246:167.

At page 11, the State cites R. 247:16 for the proposition that Mr. Lopez is left handed. The cited statement is from the prosecutor's closing argument, and cannot constitute a testimonial fact. Olsen v. Preferred Risk Mut. Ins. Co., 354 P.2d 575, 578 (Utah 1960) (statements of counsel are not evidence).

At page 20, the State asserts that "the record is devoid of indication that the witnesses acted under any personal motivation bias or prejudice . . ." To the contrary, Rick Bergsma described the race of the perpetrator as "spick", and described unusual smells, mannerisms, speech, etc. as "spicks." Ex. 5. The State's purported justification of "cramped space on the form," State's br. at 20-21, is not born out by the form itself. Mr. Bergsma had plenty of room to write hispanic, as he did in Block #3 on the front of the form.

ARGUMENT

POINT I. THE STATE MISAPPLIES RAMIREZ BY CONDUCTING ONLY A SUPERFICIAL FACT COMPARISON TO THE FACTS IN RAMIREZ, RATHER THAN A SEARCHING EXAMINATION OF THE RELIABILITY OF THE IDENTIFICATIONS UNDER THE LEGAL FACTORS SET FORTH IN THE OPINION.

Without supporting authority, the State proceeds on the untenable premise that analysis under Ramirez consists of nothing more than a comparison of the facts at bar with those in Ramirez. The State focuses on those factors where the facts in Ramirez were more favorable to its position,¹ but glosses over those factors which cut more strongly in favor of Mr. Lopez.²

¹E.g., greater opportunity to view the perpetrators, and lack of any mask.

²E.g., that the descriptions do not match Mr. Lopez' physical characteristics or the clothing he was wearing; the failure of any of the eyewitnesses to notice facial hair on the perpetrator; the cross-contamination of the identifications as the result of all three being together and speaking with each other at the time of identification; the inconsistent testimony as to the role played by the perpetrator identified as Mr. Lopez from being a third

Ramirez does not set forth a checklist, requiring that each factor militate in favor of suppression. Rather, any single factor, if sufficiently egregious, may be sufficient to undermine reliability and require suppression. Ramirez, 817 P.2d at 784 (indicating that, under the facts of that case, the suggestiveness of the identification was most critical).

POINT II. DISCREPANCIES IN THE DESCRIPTIONS GIVEN BY THE EYEWITNESSES ARE SIGNIFICANT AND STRONGLY SUPPORT A FINDING OF UNRELIABILITY.

The State puts the cart before the horse in arguing that "any discrepancies between the witnesses individual descriptions of defendant's appearance and/or between defendant's appearance at the time of his arrest, do not render the identifications inadmissible, but do bear on the individual eyewitness's credibility and weight the jurors may give the identification testimony." State's br. at 19. The State makes the same mistake concerning identification here as that made by the trial court concerning the lawfulness of the stop in Ramirez. The trial court serves a critical gatekeeping function in precluding the admission of illegally seized and unreliable evidence. Reliability is a threshold matter to be determined in the first instance by the trial court. The jury is only entitled to hear and assess the weight of the identification

perpetrator, to the perpetrator who was behind Brandi, to the perpetrator who confronted Rick and Donny; the coercive effect of identification of the getaway car in leading the eyewitnesses to expect that the perpetrators had been apprehended and were in the showup; and the selective handcuffing that naturally made Mr. Lopez and Mr. Gomez appear to be the guilty parties.

evidence if it is first determined by the trial court to be sufficiently reliable to warrant admission. Discrepancies in the descriptions given by the eyewitnesses must be considered in conjunction with all the other factors in assessing reliability.

The discrepancies here were significant. Mr. Lopez was 5'4", weighing 180 or 185 pounds. R. 246:155, 230:189, Ex. 12. The eyewitnesses described the perpetrator identified at trial as Mr. Lopez as 5'5" and 165 pounds (Rick, Ex. 33), 5'5" and 145 pounds (Brandi, Ex. 31), and similar to 5'7" and 150 pounds (Donny, Ex. 32). Each eyewitness describes someone somewhat taller and fairly significantly lighter than Mr. Lopez.

The State's reliance in its brief at p. 19 on State v. Perry, 899 P.2d 1232, 1234-5 (Utah App. 1995) is wholly misplaced. In Perry, the witness described the perpetrator as 5'6" to 5'7" and 150 pounds. Mr. Perry was 5'9" tall and 170 pounds. The discrepancy there indicates only that the victim underestimated the perpetrator's size. The description given describes a person with a similar build to the person apprehended. Perry would be apropos here if the perpetrator had been described as 5'2" and 160 pounds, or 5'6" and 205 pounds. Here, Mr. Lopez is uniformly shorter and heavier than the person described by the eyewitnesses. While they described someone slightly stocky, Mr. Lopez in contrast was downright heavy if not obese. See Ex. 11, 26. The descriptions simply do not match Mr. Lopez. The identification is unreliable.

The State similarly minimizes the fact that the witnesses were entirely inconsistent as to what part the perpetrator they

identified as Mr. Lopez may have played in the robbery. Rather than being "relatively insignificant," State's br. at 22, this inconsistency draws into question the memory acquisition, retention, and recall abilities of each of the witnesses. Their inability to keep their stories straight draws into question the veracity and reliability of those stories.

Mr. Lopez agrees with the State that the witnesses consistently described the perpetrator's height and weight, but this consistency does not "lend[] weight to the accuracy of their individual observations," State's br. at 24. They consistently describe someone taller and lighter, hence thinner, than Mr. Lopez. They described the actual perpetrator, who was not Mr. Lopez.

POINT III. THE STATE IMPROPERLY IGNORES THE TAINT OF THE IMPROPERLY SUGGESTIVE SHOWUP ON LATER PROCEEDINGS.

The State improperly characterizes the photo spread identifications as being independently obtained, State's br. at 21, without taking into consideration the fact that the initial showup was **not** independent, but rather a tainted collaborative effort. This taint carries over to all subsequent identifications, and renders them equally unreliable.

POINT IV. THE TRIAL COURT'S RULING ON THE SUFFICIENCY OF THE EVIDENCE MAY NOT BE EQUATED WITH A RULING THAT THE IDENTIFICATIONS WERE SUFFICIENTLY RELIABLE TO GO TO THE JURY.

The State correctly notes that the trial court ruled that the evidence was sufficient to go to the jury, State's br. at 28,

but this ruling may not be equated with a finding of reliability. A ruling on sufficiency necessarily assumes that the evidence presented was properly admissible. The trial court's finding of sufficiency assumes, without deciding, the reliability of the identifications. As a result of trial counsel's deficient performance, the trial court never had occasion to address that issue.

Mr. Lopez relies on his opening brief in response to those portions of the State's brief not expressly addressed here.

CONCLUSION

Based on the foregoing, Mr. Lopez respectfully requests that his conviction be reversed, and that the case be remanded for further proceedings.

RESPECTFULLY SUBMITTED this 6th day of April, 1999.



ROBERT K. HEINEMAN
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, Robert K. Heineman, hereby certify that I have caused eight copies of the foregoing to be delivered to the Utah Court of Appeals, 450 South State Street, P.O. Box 140230, Salt Lake City, UT 84114-0230, and four copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 6th day of April, 1999.



Robert K. Heineman

DELIVERED/MAILED this _____ day of April, 1999.

ADDENDUM A

Statutes, Rules, and Constitutional Provisions

The fifth amendment to the United States Constitution provides:

[Criminal actions - Provisions concerning - Due process of law and just compensation clauses.]

No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The sixth amendment to the United States Constitution provides:

[Rights of accused.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

The fourteenth amendment to the United States Constitution provides:

Section 1. [Citizenship -- Due process of law -- Equal protection.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

Article I, section 7 of the Utah Constitution provides:

Sec. 7. [Due process of law.]

No person shall be deprived of life, liberty or property, without due process of law.

Article I, section 12 of the Utah Constitution provides:

Sec. 12. [Rights of accused persons.]

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.